

Resolution No.: 15-977  
Introduced: May 3, 2005  
Adopted: May 3, 2005

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY**

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By: County Council

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**SUBJECT:** APPLICATION NO. G-826 FOR AMENDMENT TO THE ZONING ORDINANCE  
MAP, Stephen J. Orens, Esquire, Attorney for Applicant, Ralph J. Duffie, Inc.,  
OPINION AND RESOLUTION ON APPLICATION

Tax Account Nos. 05-00257967 and 05-03263783.

**OPINION**

Application No. G-826, filed on July 22, 2004, by Applicant Ralph J. Duffie, Inc., requests a Local Map Amendment (LMA) reclassifying 2.8222 acres (122,821 square feet) of land formed by two adjacent lots from the existing C-1 Zone (convenience/commercial) to the O-M Zone (office building/moderate intensity). The two lots are Parcel 18, which is 1.3822 acres located at 10001 New Hampshire Avenue and Parcel 23, which is 1.44 acres located at 1701 to 1729 Elton Road; both near the southeast corner of the intersection of New Hampshire Avenue and Elton Road, in Silver Spring. The site is across from the Hillandale Shopping Center, and just north of the northbound exit ramp for Exit 28 on Interstate 495 (*i.e.*, the Beltway).

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to retain the two-story office building and the parking on Parcel 23 and to demolish the vacant, one-story restaurant on Parcel 18, and replace it with an office building of five stories or less.

The Hearing Examiner recommended approval of the application on the basis that the O-M Zone at the proposed location would satisfy the zone's requirements and purpose clause; that the proposed

reclassification and development would be compatible with existing and planned land uses in the surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated April 21, 2005 is incorporated herein by reference. Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") recommended approval of rezoning as did the Montgomery County Planning Board ("Planning Board").

A public hearing was convened on February 11, 2005, at which time the Applicant presented evidence and testimony in support of the application. There was no opposition testimony from the community, although one neighbor, Eileen Finnegan, testified that an updated traffic analysis was needed. She also sent a letter to the Planning Board raising this traffic issue and questioning the need to rezone Parcel 23. On the support side, the Hillandale Citizens Association characterized the project as "desirable," but also asked for an updated traffic analysis. Further support took the form of a letter from Labquest, a community organization assisting the FDA's relocation to the area. Martin Klauber, the People's Counsel, participated in the hearing and supported the application, but did not call any witnesses.

The subject site is owned by the Applicant. Parcel 18 is a corner lot which has a New Hampshire Avenue address and 341 feet of frontage along Elton Road, and Parcel 23, which has 336.51 feet of frontage on Elton Road, is about 600 feet from the Prince George's County boundary. Parcel 18 consists of 1.3822 acres (60,218 square feet) and Parcel 23 consists of 1.44 acres (62,603 square feet). Both are irregularly shaped and nearly flat, with a gentle east to west slope toward New Hampshire Avenue. Parcel 18 is developed with a vacant, one-story building (most recently operated as a Shoney's Restaurant), and outdoor parking, and Parcel 23 is developed with an occupied two-story office building, also with outdoor parking. The Schematic Development Plan proposes to demolish the vacant building

on Parcel 18 and replace it with a five-story, "high quality" office building. This application does not propose any modification to Parcel 23 or its improvements.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The surrounding area in this case is bounded by I-495 to the south, New Hampshire Avenue to the west, Powder Mill Road to the north, Green Forest Drive to northeast, and the Prince George's County line to the east.

Adjoining the subject site to the south is the exit ramp of I-495. Adjoining Parcel 23 to the east is a three-story office building, also owned by the Applicant, and zoned C T (Commercial, Transitional). Confronting the properties to the north are the Hillandale Shopping Center, zoned C-1; a bank, zoned C-1; a Coca Cola plant, zoned I-1 (light industrial); and a complex of office buildings from one to three stories, zoned C-O (commercial, office building) .

The boundaries of the "surrounding area" in which the Subject Property is located coincide, for the most part, with what the White Oak Master Plan describes (Figure 19 on page 35) as the "Hillandale Commercial Center," except our defined surrounding area also includes the residences south of Green Forest Drive. The Hillandale Commercial Center is an existing commercial center that includes a local shopping center with a variety of retail commercial uses, several office buildings, and a plant facility operated by Coca Cola Enterprises, Inc. In addition to the single-family residences north of the commercial center, there are seven single-family detached dwellings and a cluster of townhouses on Avenel Gardens Lane to the east of the Subject Property, along Elton Road, just inside the Montgomery County Line.

The predominant zoning in the surrounding area is non-residential. Retail commercial and general office uses predominate, with over 15 acres of C-1 zoned and developed land on both sides of Elton Road and approximately 1.12 acres of land classified in the C-T Zone, on the south side of Elton Road, east of the Subject Property. The off street parking for both the I-1 Coca Cola property and the

adjacent C-O office building is located on R-90 zoned land by Special Exception. A townhouse rental community, in the R-T Zone and owned by the Applicant, separates the C-O zoned office building, and its appurtenant parking, from the single-family detached homes in the R-90 Zone on the north side of Elton road adjacent to the Prince George's County line. On the south side of Elton Road there are three R-90 zoned single-family homes between the C-T zoned office building on Parcel 24 and the Prince George's County line.

The Green Forest Drive community is separated from the Subject Property by commercial uses that front on and have access to Elton Road. Opposite the subject site, on the west side of New Hampshire Avenue but outside the defined surrounding area, is the George Meany Center, a labor relations college operating by special exception on land zoned R-90, and the Holly Hall Apartments for senior citizens, on land zoned R-20.

The subject property was classified in the R-90 Zone by the 1954 Countywide comprehensive zoning, and that zone was reaffirmed by the 1958 Countywide comprehensive zoning. The property now described as Parcel 23 was rezoned from R-90 to C-1, in part, in 1964, by LMA C-1187, and in part, in 1973, by LMA F-904. The property now described as Parcel 18 was rezoned from R-90 to C-1, in part, in 1964, by LMA C-1187, and in part, in 1965, by LMAs E-40 and E-41. Subsequent Sectional Map Amendments (SMAs) affecting these parcels – SMA G-337 for Eastern Montgomery County on March 16, 1982 and SMA G-746, for White Oak, on July 8, 1997 – all left the current C-1 Zone unchanged.

Applicant describes the five-story building it intends for Parcel 18 as a "Class A" office building that will be "a visual asset from the Capital Beltway." This application does not propose any modification to Parcel 23 or its current improvements. The existing building on Parcel 23 is 27.5 feet in height with a Floor Area Ratio ("FAR") of .33.

The proposed new office building will be known as "10001 New Hampshire Avenue," and it will be designed to be a key visual element along the New Hampshire Avenue corridor. The building is

currently planned with 84,305 square feet of floor space for the general office uses that are permitted in the O-M Zone. Exterior surface parking will be provided at grade, and additional parking will be provided in an underground garage. The structure will be approximately sixty (60') feet high, and its lobby will face Elton Road. This arrangement will provide continuity with the other two existing office buildings on the same side of the street.

The "Binding Elements" designated by the Applicant must be set forth both in the SDP and in a Declaration of Covenants to be filed in the county land records. The Applicant in the present case has proposed binding elements which limit development on Parcel 18 to a maximum of a five story building, with a maximum height of 60 feet, maximum building coverage of 40%, a gross floor area not exceeding 84,305 square feet, a Floor Area Ratio (FAR) no greater than 1.4, a minimum of 20% green area, compliance with the off-street parking requirements of Zoning Ordinance §59-E, restricting the driveway closest to New Hampshire Avenue to "right-in" and "right-out" turns only (if found by the Planning Board to be necessary at Site Plan Review) and re-striping the Elton Road approach to New Hampshire Avenue from 2 lanes to 3 lanes (or such other improvement as may be deemed necessary by the Planning Board at Site Plan Review).

As to parcel 23, Applicant has proposed binding elements which restrict the development to the existing improvements. In many cases the binding elements exceed the applicable development standards for the OM Zone. For example, the Zone requires no more than 60% building coverage on the lot, while Applicant has bound itself to no more than 40% coverage on Parcel 18 and 18% on Parcel 23; a minimum of 10% green space is required, while Applicant is bound to no less than 20% on Parcel 18 and 15.9% on Parcel 23. The Binding Elements are set forth on the Schematic Development Plan in separate charts for each parcel, both of which are shown below.

**Parcel 18**  
**"10001 New Hampshire Avenue"**

**Table 1**  
**BINDING ELEMENTS**

<b>Development Standards</b>	<b>Zoning Ordinance Requirements</b>	<b>Binding Elements</b>	<b>Binding Use Restrictions</b>
Lot Coverage	60%	Not greater than 40%	<b>The following uses are not permitted:</b> Ambulance or rescue squads, private. Ambulance or rescue squads, public. Chancery. Educational institutions with outdoor recreational facilities. Fire stations. Funeral parlors or undertaking establishments. Helistops. Parks and playgrounds. Places of Religious Worship. Public utility buildings and structures. Transitory use.
Building Height-stories	5 stories	Not greater than 5 stories	
Building Height-feet	60 feet	Not greater than 60 feet	
Green Area	10%	Not less than 20%	
Floor Area Ratio (FAR)	1.5	Not greater than 1.4	
Gross Floor Area (GFA)	--	Not greater than 84,305 SF	
Building Setback from New Hampshire Ave.	15 feet	Not Binding	
Building Setback from Elton Rd.	15 feet	Not Binding	
Setback - From adjacent commercial property on Parcel 23	$60' \div 3 = 20$ feet (1 foot for each 3 feet of height)	Not Binding	
Off Street Parking	2.9 spaces/1000 SF of office space = 244 spaces	The off-street parking requirements under 59-E of the Montgomery County Zoning Ordinance will be complied with on Parcel 18	
Driveway Access	N/A	The driveway closest to New Hampshire Avenue will be restricted to right in and right out turns only, if found by the Planning Board to be necessary at Site Plan Review.	
N/A	N/A	The Elton Road approach to New Hampshire Avenue to be re-striped from 2 lanes to 3 lanes or such other improvement as may be deemed necessary at Site Plan Review.	

**Parcel 23**  
**“Capital Beltway Building”**

**Table 2**  
**BINDING ELEMENTS**

<b>Development Standard</b>	<b>Zoning Ordinance</b>	<b>Binding Elements (SAME AS EXISTING DEVELOPMENT)</b>	<b>Binding Use Restrictions</b>
Lot Coverage	60%	18%	<b>The following uses are not permitted:</b> Ambulance or rescue squads, private. Ambulance or rescue squads, public. Chancery. Educational institutions with outdoor recreational facilities. Fire stations. Funeral parlors or undertaking establishments. Helistops. Parks and playgrounds. Places of Religious Worship. Public utility buildings and structures. Transitory use.
Building Height-stories	5 stories	2 stories	
Building Height-feet	60 feet	27.5 feet	
Floor Area Ratio (FAR)	1.5	.33	
Gross Floor Area	--	20,831 SF	
Green Area	10%	15.9%	
Building Setback-from Elton Road	15 feet	15 feet	
Setback-from Capital Beltway Ramp	15 feet	17 feet	
Setback-from adjacent commercial property on Parcel 24	27.5'÷3 = 9.16 feet (1 foot for each 3 feet of height)	386 feet	
Off Street Parking	61 spaces	100 spaces	

In a floating zone case, the application must be evaluated in light of all the uses permitted in the requested zone, to which the property could reasonably be put, other than uses that are restricted by an SDP. See *Wheaton Moose Lodge v. Montgomery Co.*, 41 Md. App. 401, 418-420, 397 A.2d 250 (1979). Although Zoning Ordinance § 59-C-4.2 permits many uses by right or by special exception in the O-M Zone, it is likely that some of those uses would not be feasible with the building size limitation imposed by the amended SDP and for other reasons inherent in the particular location. However, Applicant has committed itself to “Binding Use Restrictions,” in addition to Binding Elements regarding development

standards and parking, as is permitted under the "Optional Method." These can be found in the right-hand columns in the two Binding Elements charts, above.

The evidence established that the most intense use of the proposed office building (and the most intense generator of peak hour trips) would be to establish a restaurant on the premises, in addition to the intended general office use. Accordingly, the effects of the proposed rezoning, including the impact from traffic, were evaluated based on that most intensive use that is permitted and feasible, and the preponderance of the evidence is that the use would be compatible with the surrounding area.

A floating zone, such as the O-M Zone, is a flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed location satisfies the requirements and purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967).

Montgomery County has many floating zones, including the O-M Zone. The O-M Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a re-zoning.

When the reclassification sought by an applicant is recommended by either the applicable Master Plan or the Planning Board, approval of the rezoning by the Council requires an affirmative vote of 5 Council members. Zoning Ordinance §59-H-8.2(b). Although the *1997 White Oak Master Plan* does not specifically recommend reclassification to the O-M Zone for the subject site, the Planning Board recommended approval, and therefore an affirmative vote of only 5 members of the Council is required.



We turn now to the three areas of review discussed above, the requirements and purpose clause of the zone, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

The development standards for the O-M Zone are spelled out in Zoning Code Sections 59-C-4.311 through 314. The District Council finds that the Applicant has complied with the O-M Zone's development standards, as shown below.

Development Standards	Required/Allowed	Provided in Parcel 18	Provided in Parcel 23
Lot Coverage	60% maximum	≤ 40%	18%
Building Height	5 stories (60 ft) maximum	≤ 5 stories (60 ft)	2 stories (27.5 ft)
Green Area	10% minimum	≥ 20%	15.9%
Floor Area Ratio (FAR)	1.5 FAR maximum	≤ 1.4 FAR	.33 FAR
Setback – from New Hampshire Ave	15 feet	~105 feet*	Not applicable
Setback - from Elton Road	15 feet	~ 20 feet*	15 feet
Setback - from Beltway Ramp	15 feet	~ 38.7 feet*	17 feet
Setback – of Proposed Parcel 18 Building from Adjacent Parcel 23 Commercial Property Lot Line	(1 foot for each 3 feet of height) $60 \div 3 = 20$ feet	~ 47 feet*	Not applicable
Setback – of Existing Parcel 23 Building from Adjacent Parcel 24 Commercial Property Lot Line	(1 foot for each 3 feet of height) $27.5 \div 3 = 9.16$ feet	Not applicable	386 feet
Off Street Parking	(2.9 spaces per 1000 sq.ft. of office space) Parcel 18 = 244 spaces Parcel 23 = 61 spaces	Whatever is required by Zoning Ordinance §59-E	100 spaces

\* The asterisked setbacks are not binding because the building is still in the design stage.

The purpose clause for the O-M Zone, §59-C-4.310, contains several requirements for eligibility:

(1) that the property is located outside of a central business district; (2) that the property is located in an area where high intensity uses are not appropriate; (3) that the property is located where a moderate-

intensity office building will not have an adverse impact on the adjoining neighborhood; and (4) that the surrounding area is not predominantly one-family residential in character.

The District Council finds that the rezoning will satisfy the requirements of the purpose clause because: (1) the property is located outside of a central business district; (2) the property is located in an area where high intensity uses are not appropriate, given the potential for traffic congestion they would cause and given the fact that uses in the surrounding area are predominantly low and moderate intensity commercial, with a few residential uses; (3) the property is located where a moderate-intensity office building will not have an adverse impact on the adjoining neighborhood because, as noted, the neighborhood is predominantly commercial, with only scattered residential uses; and (4) the surrounding area is not predominantly one-family residential in character.

Compatibility has generally been evaluated in terms of land use, density, height and bulk. The evidence indicates that the proposed use will be compatible with existing and planned development within the surrounding area. The office building planned for the subject property will be situated within the Hillandale Commercial Center and will front on the area marked in the Master Plan as a "Gateway" to Hillandale. The property has a major arterial (New Hampshire Avenue) to its west, a Beltway ramp to the south, an office building to the east and mixed commercial uses confronting to the north. It is thus compatible with surrounding uses and will serve as an attractive gateway into Hillandale. As noted by the Technical Staff, the five story building planned for Parcel 18 will be somewhat taller than the surrounding one to three story structures, but still compatible given its location next to the Beltway and other commercial uses.

Maryland law requires that any rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

" . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety,

morals, comfort, and welfare of the inhabitants of the regional district.”  
[*Regional District Act*, Maryland-National Capital Park and Planning  
Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which may be considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff and possible adverse effects on the surrounding area, public facilities and the environment.

The 1997 *White Oak Master Plan* does not specifically recommend a change in the current C-1 zoning; its Land Use Plan does, however, support continuing the current “Commercial/Office” land use on the subject site (page 25). The Master Plan is a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the O-M Zone (Zoning Ordinance §§59-C-4.31, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to inconsistency with a part of the Master Plan becomes a policy issue more than a legal question.

The Master Plan includes the subject site within the “Hillandale Commercial Center” depicted in Figure 19 on page 35 of the Plan, and observes that “redevelopment of older office and retail buildings may occur . . .” Figure 19 in the Master Plan designates New Hampshire Avenue and Elton Road as a “Gateway Location.” In Technical Staff’s opinion, “[t]he proposed office building, at this location, will serve as a ‘gateway’ to Hillandale.” Most importantly, the proposed use is consistent with the land use recommended by the Master Plan. Figure 14 on page 25. Community-Based Planning Staff opined that the proposed use would be “consistent with the recommendations of the White Oak Master Plan and is compatible with the existing 1 to 3 story buildings and uses in the Hillandale commercial area.”

Both the Planning Board and the Technical Staff recommended approval of this rezoning application. Moreover, the evidence discussed above demonstrates compatibility with the surrounding

area. Accordingly, the District Council concludes, based on a preponderance of the evidence, that the rezoning will be in accordance with the Land Use Plan and goals of the 1997 *White Oak Master Plan*.

The impact of the proposed development on transportation facilities was the only bone of contention at the public hearing in this matter. The contested issue concerned the appropriate figures to be used in completing the Local Area Transportation Review (LATR). Although the District Council has given serious consideration to the request by Hillandale Citizens Association and Eileen Finnegan for an updated LATR, it finds that the requiring Applicant to update its LATR traffic study at this stage would be contrary to procedures used by the M-NCPPC and otherwise inappropriate for all the reasons set forth in the Hearing Examiner's report. Based on the testimony of Technical Staff, the findings in Transportation Planning Staff's report, and the Hearing Examiner's evaluation of the evidentiary and procedural issues, the District Council concludes that Applicant employed the correct figures and the appropriate analysis in its LATR study. The results of that study demonstrate that, with the traffic mitigation measures Applicant will undertake (re-striping Elton Road at its intersection with New Hampshire Avenue, and restricting turn directions in the driveway nearest that intersection), the proposed development will satisfy LATR and will not unduly burden traffic in the surrounding area.

This office development will have no impact on schools since there will be no residential units. It is also well served by utilities, and no evidence was presented to suggest that the proposed development would have an adverse effect on any public services. Similarly, there are no environmental issues in this case. The subject site contains no woodlands, floodplains, wetlands or other natural resources; nor have any rare, threatened or endangered species been identified. There are also no trees exceeding 24 inches in diameter. Applicant will be required at site plan review to meet the state and Montgomery County requirements for storm water management, as Applicant has promised to do.

For all of these reasons, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public

facilities or the environment and that approval of the requested zoning reclassification would be in the public interest.

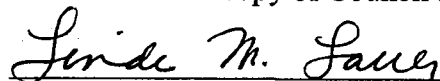
Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements and purpose clause of the O-M Zone; that the application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area; and that the requested reclassification to the O-M Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

#### **ACTION**

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-826, requesting reclassification from the C-1 Zone to the O-M Zone of 2.8222 acres of land in adjacent lots, known as Parcels 18 and 23, and located in the 5<sup>th</sup> Election District, at 10001 New Hampshire Avenue (Parcel 18), and 1701 to 1729 Elton Road (Parcel 23), is hereby approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 62(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council